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## A ROLE FOR DISCIPLINARY AGENCIES IN THE JUDICIAL SELECTION PROCESS

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# A ROLE FOR DISCIPLINARY AGENCIES IN THE JUDICIAL SELECTION PROCESS

**Cover Page Footnote**

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## A ROLE FOR DISCIPLINARY AGENCIES IN THE JUDICIAL SELECTION PROCESS

*Robert H. Tembeckjian\**

All fifty states and the District of Columbia have a judicial disciplinary entity responsible for investigating complaints of ethical wrongdoing by judges and, where appropriate, disciplining or recommending discipline for those judges found to have engaged in misconduct.<sup>1</sup> These jurisdictions also have grievance committees to deal with complaints against lawyers.<sup>2</sup>

Whether a state chooses its judges by appointment, election, or some combination of the two, is there an appropriate role for a judicial disciplinary commission or an attorney grievance committee in the selection or evaluation process of judicial candidates? If so, how limited or expansive should that role be?

The answers to these questions vary from jurisdiction to jurisdiction. While all the states have disciplinary systems, there is no uniformity as to whether or to what degree the disciplinary entity may participate in the selection or evaluation process.<sup>3</sup>

In Michigan and Mississippi, for example, the Judicial Tenure Commission and the Commission on Judicial Performance, respectively, play no role in the selection process.<sup>4</sup> In Indiana and the District of Columbia, the Commission on Judicial Qualifications

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1. See David Cleveland & Jason Masimore, *The Ermine and Woolsack: Disciplinary Proceedings Involving Judges, Attorney-Magistrates and Other Judicial Figures*, 14 GEO. J. LEGAL ETHICS 1037, 1043 (2001) (noting that all fifty states and the District of Columbia have established judicial discipline organizations in order to “review and supervise judicial behavior and reprimand errant judges”).

2. For a list of these grievance committees, see ABA CTR. FOR PROF'L RESPONSIBILITY, DIRECTORY OF LAWYER DISCIPLINARY AGENCIES (Oct. 26, 2006), <http://www.abanet.org/cpr/regulation/scpd/disciplinary.html>.

3. See AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2004), [www.ajs.org/js/JudicialSelectionCharts.pdf](http://www.ajs.org/js/JudicialSelectionCharts.pdf) (last visited Jan. 30, 2007) (providing data summarizing each jurisdiction's method of judicial selection); see also *infra* notes 4-6 and accompanying text (indicating that in states such as Michigan and Mississippi, disciplinary committees are not involved in the selection process, while in jurisdictions such as Indiana and the District of Columbia, disciplinary committees play an active role in judicial selection).

4. See MICH. CONST. art. VI, § 30 (providing for the creation of Michigan's Judicial Tenure Commission); MISS. CONST. art. VI, § 177A (providing for the creation of Mississippi's Commission on Judicial Performance); see also William B. Murphy & Joseph F. Regnier, *Malpractice/Attorney Discipline: The Role and Function of the Ju-*

and the Commission on Judicial Disabilities and Tenure, respectively, are integral parts of the selection process and in fact double as the judicial nominating entity for some or all judicial vacancies.<sup>5</sup> For example, for vacancies on the Indiana Supreme Court or Court of Appeals, the commission nominates three candidates to the governor, who must choose from among those nominees.<sup>6</sup>

In New York, the Commission on Judicial Conduct plays a limited role, required by statute under certain circumstances to reveal information pertaining to candidates under consideration for appointment by the governor or being rated by such entities as a bar association evaluation committee for election or appointment.<sup>7</sup> (Records of attorney grievance committees may be released for “good cause” on order of the Appellate Division.<sup>8</sup>) This approach appears to be rooted in the notion that disciplinary entities, while not necessarily oriented toward identifying those best or most qualified for judicial office, are likely to have useful information as to candidates that may be ill-suited for the bench.

The overwhelming majority of New York State’s 3,400 judges are elected to office.<sup>9</sup> A relative few—judges of the Court of Appeals, the Court of Claims, and the New York City Criminal and Family Courts, for example—are appointed.<sup>10</sup>

One of the concerns often expressed regarding a shift from a predominantly elective system to an appointive system is the effective disenfranchisement of the electorate that would result.<sup>11</sup> One of the common rebuttals to this concern is the example of the fed-

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*ditional Tenure Commission*, 75 MICH. B. J. 1042, 1042-44 (1996) (describing the functions of the Michigan Judicial Tenure Commission).

5. See IND. CONST. art. VII, § 9 (providing for the establishment of Indiana’s Commission on Judicial Qualifications); District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, § 433(c), 87 Stat. 774, 796 (1973) (describing the role of a Judicial Tenure Commission in the District of Columbia in evaluating candidacy for judicial reappointment).

6. IND. CONST. art. VII, §§ 9-10.

7. N.Y. Judiciary Law § 45 (McKinney 2006).

8. *Id.* § 90(10).

9. See Steven Zeidman, *To Elect or Not to Elect: A Case Study of Judicial Selection in New York City 1977-2002*, 37 U. MICH. J.L. REFORM 791, 800 (2004); see also AM. JUDICATURE SOC’Y, NEW YORK JUDICIAL SELECTION: AN INTRODUCTION, <http://www.ajs.org/js/NY.htm> (last visited Oct. 16, 2006).

10. For an illustration of how judges are selected in New York, see AM. JUDICATURE SOC’Y, NEW YORK JUDICIAL SELECTION: CURRENT METHODS OF JUDICIAL SELECTION, [http://www.ajs.org/js/NY\\_methods.htm](http://www.ajs.org/js/NY_methods.htm) (last visited Oct. 16, 2006) [hereinafter NEW YORK METHODS].

11. See, e.g., Seth Anderson, *Examining the Decline in Support for Merit Selection in the States*, 67 ALB. L. REV. 793, 796 (2004) (suggesting voter disenfranchisement as an explanation for the decline in voter support for appointive judicial systems).

eral judiciary, which has never been elected and was purposefully designed to be independent of the partisan political process.<sup>12</sup>

Without comment on whether an appointive system would be superior or inferior to the electoral method, the New York experience in a predominantly electoral system suggests that in an appointive system, participation by the judicial or attorney disciplinary entity can at least partially compensate for the lack of direct voter participation, assuming—as is the case in New York—that the system reposes the actual authority to nominate and/or confirm in elected representatives of the body politic.<sup>13</sup> Obviously, no system, elective or appointive, is going to be perfect or please every constituency. For any method to work, the public must have justifiable faith in the reasonableness of the structure and the good faith efforts of the participants in fulfilling their responsibilities.

Like most professional disciplinary entities, the New York State Commission on Judicial Conduct (“the Commission”) operates under a strict mandate of confidentiality in the investigative stage of its work.<sup>14</sup> (New York is in the minority of states—thirty-eight to twelve—insofar as it requires proceedings to remain confidential even when investigation is concluded and formal disciplinary charges have been proffered against the respondent judge.<sup>15</sup>)

There is a natural tension in this process between legitimate competing forces. The Commission must conduct its investigative work vigorously yet discreetly.<sup>16</sup> It must protect the confidentiality of both respondents and complainants, while weighing a compelling responsibility to provide the public, directly or through its representatives, appropriate information bearing on the qualifications and fitness of those running or being considered for judicial office.<sup>17</sup> There is a legitimate argument to be made that the Commission is obliged to provide enlightening, useful, and credible information to the appointing, nominating, or electing authority to

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12. See Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL’Y 273, 300 (2002).

13. Judicial nomination of the New York Court of Appeals and Appellate Division positions is done by a commission appointed by the governor. See N.Y. JUD. LAW §§ 62-63. Selection of New York Supreme Court judges is done by partisan election. See NEW YORK METHODS, *supra* note 10.

14. N.Y. JUD. LAW §§ 44(3) & 45.

15. See AM. JUDICATURE SOC’Y, WHEN CONFIDENTIALITY CEASES, <http://www.ajs.org/ethics/pdfs/When%20confidentiality%20ceases.pdf> (last visited Nov. 8, 2006).

16. See N.Y. JUD. LAW § 45.

17. See *id.* § 42; see also *Nicholson v. State Comm’n on Judicial Conduct*, 409 N.E.2d 818 (N.Y. 1980).

ensure that such entities make an informed decision on whom to elevate to the bench. Should not a governor or the voting public know, for example, that a particular candidate for judicial office had been issued three or four private reprimands by an attorney or judicial disciplinary body?

There is also tension as the Commission endeavors to protect the integrity of the system from interference or manipulation by individuals inappropriately motivated by politics to manufacture complaints against their opponents in hopes of thwarting a favorable rating for appointment or election. (While smoke does not always mean fire, the appointing or electing authorities may not have enough time to recognize and reject a misinformation campaign.)

Can we negotiate such tensions in the Commission that possesses information useful to a nominator's evaluation of a candidate's credentials, without at the same time compromising the confidentiality mandate that both protects the accused and the independence of the Commission to do its work? Can the Commission freely make a decision on the merits of a case today without necessarily being influenced by the possibility that its decision may have an impact on the retention prospects of the judge under scrutiny?

The mechanism devised by New York and some other states to deal with these issues is the waiver of confidentiality.<sup>18</sup> Section 45 of New York State's Judiciary Law provides that, on a written waiver of confidentiality by a judge, the Commission must disclose certain information to those individuals or organizations named in the waiver.<sup>19</sup> For example, any formal public or private discipline of the judge must be revealed,<sup>20</sup> but frivolous or unsubstantiated complaints would not be revealed.<sup>21</sup>

Thus, the Commission would release to any entity that is evaluating a candidate for nomination or election to the bench, pursuant to a written waiver of confidentiality from that applicant, whatever private or public disciplinary action there has been against that in-

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18. See N.Y. JUD. LAW § 45(1)

19. See *id.*

20. See *Nichols v. Gamso*, 35 N.Y.2d 35, 38 (1974).

When . . . charges or complaints are sustained and the determinations are made public by the court with jurisdiction of the charges, it may be an abuse of discretion, as a matter of public policy, absent compelling circumstances affecting the public interest, not to make available to public scrutiny so much of the record and proceedings as bear on the charges sustained.

*Id.*

21. See *In re Mertens*, 395 N.Y.S.2d 195, 196 (App. Div. 1977) (holding that courts "may apparently only release the portions of the record relating to charges which have been sustained . . .").

dividual.<sup>22</sup> This helps protect the integrity of the appointment process by presenting information that by any standard would be significant for an evaluator to consider, while at the same time protecting both the Commission's files and the judicial candidate's reputation from unwarranted invasion or attack.<sup>23</sup> The waiver of confidentiality is not meant to, and should not, encourage the proverbial fishing expedition by anyone looking to obtain confidential material that did not result in adverse action to the respondent.<sup>24</sup> Even if the candidate were the subject of numerous unsubstantiated complaints, such information would not necessarily be probative of her credentials, could readily be misinterpreted, and should not be disclosed.<sup>25</sup> For example, any judge who has presided over contested matrimonial and custody cases, which tend to be fiercely and often bitterly litigated, will likely generate much criticism from dissatisfied litigants. Yet the volume of complaints would more likely reflect the intensely personal and unhappy nature of the cases rather than the judge's demeanor or ethical credentials.

So, if someone had been the subject of twenty or thirty complaints and none of them were found to be meritorious, the Commission would not reveal that information, even with a waiver of confidentiality signed by the judge.<sup>26</sup> But if the individual was the subject of a confidential disciplinary letter of caution,<sup>27</sup> or a public

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22. See *Nichols*, 35 N.Y.2d at 38.

23. See *Nicholson v. State Comm'n on Judicial Conduct*, 409 N.E.2d 818, 825 n.\* (N.Y. 1980) (“[The confidentiality of preliminary commission proceedings] serve[s] the dual purpose of protecting the confidentiality of complainants and witnesses, thus, ensuring the more effective functioning of the commission, and of protecting the Judge under investigation from injury to reputation resulting from the exposure of unjustified complaints.”); see also *Landmark Comm., Inc. v. Virginia*, 435 U.S. 829, 835 (1978) (“[T]he confidentiality . . . protects judges from the injury which might result from publication of unexamined and unwarranted complaints.”).

24. See, e.g., *Nichols*, 35 N.Y.2d at 39 (stating that confidential material related only to charges actually sustained need be disclosed); *Mertens*, 395 N.Y.S.2d at 196 (citing the impermissibility of releasing confidential material relating to false accusations).

25. See *Nichols*, 35 N.Y.2d at 39 (“[S]o much of the record and proceedings which do not relate to the charges *sustained* need not be disclosed.”) (emphasis added).

26. N.Y. JUD. LAW § 45(1) (McKinney 2006) (providing that Commission proceedings are confidential except when an adverse determination has been made against a judge by the Commission pursuant to § 44).

27. N.Y. COMP. CODES R. & REGS. tit. 22, § 7000.1(m) (2006) (defining a “letter of caution” as “written confidential comments, suggestions and recommendations . . . issued by the commission to a judge at the conclusion of proceedings pursuant to a formal written complaint, upon a finding that the judge’s misconduct is established”); see also *id.* § 7000.7(d) (providing that the Commission may issue a letter of caution when “a determination other than admonition, censure, removal or retirement from office is [deemed] appropriate”).

determination of admonition, censure, or removal from office,<sup>28</sup> that information would be revealed.<sup>29</sup>

Judiciary Law Section 45 also provides that, pursuant to a waiver of confidentiality, the Commission must reveal to the governor any pending complaint against the subject judge.<sup>30</sup> The statute also gives the Commission fifteen days to respond to such requests for information.<sup>31</sup> This allows for the opportunity to dismiss frivolous complaints before the compliance period expires, providing a valuable hedge against a disreputable campaign to torpedo a nomination with innuendo. Imagine, for example, a judicial candidate's opponents orchestrating a bogus complaint-writing campaign just as the nominator or evaluator is deciding whether to support or oppose the candidate's nomination or election. The candidate would submit a waiver of confidentiality without necessarily knowing that such complaints had been generated. Were the Commission required to turn over such bogus complaints without an opportunity to evaluate and dismiss them, the nominating process would be inappropriately manipulated and seriously compromised. With the statutory fifteen-day window, however, the Commission can consider and, if warranted, dispose of new complaints without having to disclose them to the nominating or evaluating authority, even with a waiver of confidentiality in place.<sup>32</sup>

This fairly sophisticated structure did not spring full-blown from the mind of some sage. Rather, it has evolved over the years as the subject of legislative amendment, formal advisory opinions, and litigation. Over a thirty-year period, the Legislature, the courts, and the Commission amassed experience in dealing with issues of judicial conduct, including good-faith attempts to pierce the confidentiality shield<sup>33</sup> and bad-faith attempts to undermine a judge's retention prospects with frivolous complaints that were then made public by the judge's opponents.<sup>34</sup>

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28. N.Y. JUD. LAW § 44(7).

29. *Id.* (“[T]he determination of the commission, its findings and conclusions and the record of its proceedings shall be made public and shall be made available for public inspection at the principal office of the commission and at the office of the clerk of the court of appeals.”).

30. *Id.* § 45(2)(b).

31. *Id.* § 45(2)(c).

32. *See* N.Y. COMP. CODES R. & REGS. Tit. 22, § 7000.3(b).

33. *See, e.g., Stern v. Morgenthau*, 465 N.E.2d 349, 353 (N.Y. 1984) (holding that a Grand Jury subpoena for confidential Commission records should be quashed).

34. *See, e.g., In re Harrison*, 611 S.E.2d 834, 835 (N.C. 2005) (reviewing a judge's allegations that a series of frivolous complaints had been filed against her before the North Carolina Judicial Standards Commission).

One category of information held by the Commission, arguably of interest to the appointing or electing authority but not explicitly covered among the material that must be disclosed pursuant to a waiver, is the letter of dismissal and caution,<sup>35</sup> as distinguished from the aforementioned letter of caution,<sup>36</sup> which must be revealed. Whereas a confidential letter of caution is issued to a judge at the conclusion of a formal disciplinary proceeding in which the judge's misconduct is established, a confidential letter of dismissal and caution is issued to the judge *in lieu* of a formal disciplinary proceeding.<sup>37</sup> Dismissal and caution letters generally serve an educational purpose and may advise a judge to adhere more carefully to particular provisions of law or the Code of Judicial Conduct which, on an isolated basis, the judge may have overlooked.

Should an appointing or evaluating authority be allowed to review such letters of dismissal and caution? Might the letters provide some useful point of reference or comparison with a judge who never received one? Might the letters reveal positive information about the judge, such as openness to constructive commentary and a capacity to improve? It is not unusual for letters of dismissal and caution to note that the judge recognized a shortcoming and already took corrective measures. Typically, an appointing or evaluating authority, such as a gubernatorial or legislative committee or bar association, would appropriately assess the significance of such letters. There is no evidence that a qualified judicial applicant or candidate was ever wrongfully denied office or advancement because of the information contained in such a letter.<sup>38</sup>

The Commission's position has always been that a judge is affirmatively obliged to reveal such a letter in response to a request from such an authority, but the governing statute does not permit the Commission itself to disclose it, even with a waiver from the judge.<sup>39</sup> Unfortunately, there have been times when candidates for judicial appointment have failed to reveal such information, even when directly asked by the appropriate authority.<sup>40</sup>

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35. N.Y. COMP. CODES R. & REGS. Tit. 22 § 7000.1(l) .

36. *Id.* § 7000.1(m).

37. *See id.* §§ 7000.1(l)-(m).

38. *See generally id.* § 7000.4(a)(1).

39. *See* N.Y. JUD. LAW § 45(1) (McKinney 2006).

40. In one reported case, a judge denied to the Governor's Judicial Screening Committee that he was under investigation by the Commission when in fact he knew that he was, having recently appeared at the Commission to testify about the matter. *In re Collazo*, 691 N.E.2d 1021, 1022 (N.Y. 1998). In at least one unreported situation, the Commission became aware that a judge who had received letters of dismissal and

To prevent against such manipulations, the Governor's Judicial Screening Committee in New York developed a protocol in 2003 by which it first asks the judicial candidate to request from the Commission copies of any public disciplines and confidential cautionary letters previously issued to her, then asks the candidate to disclose the Commission's response. It is always the candidate's option to agree or decline to sign the waiver of confidentiality or otherwise provide the appointing or evaluating authority with requested information.<sup>41</sup> As a practical matter, it is highly unlikely that anyone who declined such requests would be appointed or rated qualified by a bar association,<sup>42</sup> although in an elected system such a candidate could prevail with the voters nonetheless.<sup>43</sup>

Nothing in the judicial appointment or election process, or the procedures discussed here, should be confused with or viewed as a substitute for the disciplinary process whereby an incumbent judge could be formally disciplined, including removal from office.<sup>44</sup> Ascending the bench and being reappointed or reelected is not modeled on due process, as the disciplinary system is.<sup>45</sup> No judicial conduct commission should attempt to achieve the removal of a judge for office by shortcut, through negative evaluations elicited during either the appointive or elective re-ascension process, without resort to a due process notice and hearing procedure. The integrity of such a commission would be seriously compromised were it to be reasonably perceived as so politically motivated and manipulative.<sup>46</sup>

Due process of law can take a very long time. But it is one of the essential elements and strengths of our legal and disciplinary system that must not be abridged, even where the best appointive or elective system produces the occasional "bad apple." Fortunately,

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caution misleadingly described them as outright dismissals without providing the nominating entity with hard copies.

41. See N.Y. JUD. LAW § 45(2).

42. See *Collazo*, 691 N.E.2d at 1023 (noting that a judicial nominee's failure to return promptly a Senate Judiciary Committee's request for waiver of his right to confidentiality contributed to the determination of the nominee's pattern of evasive and deceitful behavior).

43. Michael Cardozo, *Cardozo's Reform Rx: Mending a Broken Bench*, JUD. REP., Sept. 8, 2006, available at [http://www.judicialreports.com/archives/2006/09/the\\_cardozo\\_rx\\_for\\_judicial\\_re\\_1.php](http://www.judicialreports.com/archives/2006/09/the_cardozo_rx_for_judicial_re_1.php).

44. See N.Y. JUD. LAW § 44.

45. See N.Y. STATE COMM'N ON JUDICIAL CONDUCT, 2006 ANNUAL REPORT 22 (2006), available at <http://www.scjc.state.ny.us/publications/2006%annual%20report.nysjc.pdf> (last visited Nov. 1, 2006).

46. See generally Mark Alcott, Op-Ed., *Picking Judges on the Merits*, N.Y. TIMES, Oct. 15, 2006.

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the vast majority of judges are honorable, independent, and impartial and have nothing to fear from the conduct commission's limited but important participation in the appointment and electoral evaluation processes.<sup>47</sup>

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47. See Cardozo, *supra* note 43 (explaining that although the judicial appointment process in New York requires mending, "most judges are honest, hardworking, and smart men and women").

